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Supreme Court Of The United States

OCTOBER TERM, 1974

No. 74-294

MITCHELL WATSON, MENIFEE WATSON,
IDA MAE MULLINS, JUDGE WATSON,
OLGA WATSON, MANILEA ROWE and
RANDOLPH WATSON - - - - -Petitioners

versus

KENLICK COAL COMPANY, INC.,
TIP TOP COAL COMPANY, INC.,
SHERMAN BAILEY, LEXIE BAILEY,
J. W. HOWARD and
FLORENCE HOWARD - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court Of The United States

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No._____

MITCHELL WATSON, MENIFEE WATSON, IDA MAE MULLINS, JUDGE WATSON, OLGA WATSON, NANILEA ROWE and RANDOLPH WATSON *Petitioners*

versus

KENLICK COAL COMPANY, INC., TIP TOP COAL COMPANY, INC., SHERMAN BAILEY, LEXIE BAILEY, J. W. HOWARD and FLORENCE HOWARD *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 21, 1974, affirming the denial of relief by the United States District Court for the Eastern District of Kentucky.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix, *infra.* p. 1a-19a. The

memorandum opinion and order of District Court denying relief is reported at 365 F.Supp. 456 and is set out in the Appendix, *infra.*, p. 21a-27a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 21, 1974, Appendix A. p. 1a-19a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does a pervasive state regulation of the coal companies' strip mining activities coupled with state court decisions that interpret the broad form deed in such a manner that gives the coal companies a right to destroy the surface of the land in the process of taking coal from beneath the land and thereby granting the coal company a privileged status constitute state action? Is the broad form deed constitutional?

2. Does strip mining which destroys the surface of the land, without the surface owner's consent, and where no compensation is paid to the surface land owner, constitute an unjust taking without just compensation under the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Watson family, petitioners, own land, except for the mineral rights therein, on the Laurel Fork of the Oakley Creek in Magoffin County, Kentucky. Respondents, J. W. Howard and Florence Howard, sold or leased certain mineral rights connected with petitioners' land to respondents Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc. Respondent Sherman Bailey is president of Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc., and respondent Lexie Bailey is the secretary of Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc. Both coal companies are incorporated in the Commonwealth of Kentucky.

The coal companies have strip mined coal on the Watson Land without permission from the Watson family and under the authority of a broad form deed. The strip mining primarily took place from 1958 through 1971 and the coal companies presently have strip mining permits that will allow them to strip mine whenever they want. The strip mining activities of the coal companies have virtually destroyed the Watson land and made it unfit for agricultural and forest purposes. Sulfurous and other deleterious substances brought to

the surface by the mining operation have added to the destruction of the substance of the soil and timber. Mud, dirt, rocks, and debris have, as a result of the coal companies' mining operations, been washed and eroded onto petitioners' lower land and upon improvements and personal belongings. The surface of the land has been rendered unfit for use and the surface and subterranean water of the land has been poisoned. Furthermore, in contravention of Kentucky law, Kentucky Revised Statute (K.R.S.) 350.100(1), the respondents have taken no steps to reclaim any portion of the land in question destroyed by their mining practices.

The petitioners filed suit in the United States District Court for the Eastern District of Kentucky claiming they had been deprived of their property without due process of law in violation of the Fifth Amendment to the United States Constitution to their damage of five hundred thousand dollars ($500,000). The petitioners also alleged that the Commonwealth of Kentucky had unconstitutionally involved itself in the taking of their property without just compensation and without due process of law. The action by the state was violative of the due process provisions of the Fifth Amendment to the United States Constitution as applied to the state by the Fourteenth Amendment to the United States Constitution. The state had illegally involved itself in two ways. The state legislature has pervasively regulated the strip mining industry, including the respondents, by setting up a state regulatory agency, the Kentucky Division of Reclamation, and given it strong and wide-ranging powers. In addition the Kentucky Court of Appeals has in a long line of cases given

judicial sanction to the strip mining practices, such as respondents have engaged in, by holding that such strip mining practiced under authorization from a "broad form" deed is legal. The holdings of Kentucky's highest Court are in opposition to the rulings by almost every other state court and even in conflict with its own rulings in similar oil and gas rights situations.

The petitioners argued that federal jurisdiction arose over the acts complained of under the Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §1331(a), 28 U.S.C. §2201, 2202, and 42 U.S.C. §1983, 1984. In addition to monetary damages, the petitioners sought an injunction against respondents' illegal mining practices. The District Court dismissed the petitioners' complaint for lack of subject matter jurisdiction (App. 21a-27a). The decision was affirmed by the Court of Appeals (App. 1a-19a).

Between the decision by the District Court and after briefs had been submitted to the Court of Appeals, but before oral arguments at the Court of Appeals, the Kentucky General Assembly passed on February 21, 1974, House Bill 9 (App. 29a-34a), to take effect January 1, 1975. This bill in effect said that strip mining would no longer be allowed without the written consent of the surface owner of the land to be mined.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A PERVASIVE STATE REGULATION OF THE COAL COMPANIES' STRIP MINING ACTIVITIES COUPLED WITH STATE COURT DECISIONS THAT INTERPRET THE BROAD FORM DEED IN SUCH A MANNER THAT GIVES THE COAL COMPANIES A RIGHT TO DESTROY THE SURFACE OF THE LAND IN THE PROCESS OF TAKING COAL FROM BENEATH THE LAND AND THEREBY GRANTING THE COAL COMPANY A PRIVILEGED STATUS, CONSTITUTES STATE ACTION.

The respondents have engaged in strip mining under the authority of a broad form deed. Strip mining differs from underground mining in that while underground mining removes the coal from beneath the earth's surface, strip mining is a method of removing coal from the earth which utilizes a removal of the overlying strata as the primary method of obtaining access to the coal. The coal companies are engaged in contour strip mining on the Watson land. Contour strip mining is explained by a former director of the Kentucky Division of Strip Mining and Reclamation.

> Contour Strip Mining is practiced in steep or mountainous country, such as is found in Eastern Kentucky. This method consists of removing the overburden above the coal seam by starting at the outcrop and proceeding along the hillside. After the exposed coal is removed in the original cut, additional cuts are made until the ratio of overburden to coal produced brings the operation to a halt. Contour mining creates a shelf, or bench, on the hillside. On

the inside it is bordered by the highwall, which may range from a few feet to more than 100 feet in height. The opposite side is a precipitous slope that has been covered by spoil material cast down the hillside. Unless stabilized, this spoil material can cause severe erosion and landslides. Elmore C. Grim, "Kentucky's Reclamation Program," *Kentucky Engineer,* November 1967, at 11-12.

While there is a disagreement as to when strip mining practices began in use, it is agreed by most all that the practice did not develop on a wide-spread scale until after World War II. Then the demand of low cost electricity coupled with the scientific and technological advancements developed more efficient and larger machinery for biting into the mountains of eastern Kentucky.

The conveyance instrument under which the coal companies have strip mined is commonly known as a broad form deed whereby the mineral estate is severed from the surface estate. In the present case the mineral estate was severed from the surface estate in 1905. Among the numerous rights that went along with the mineral estate were the right to "all coal mineral and mineral substances and products; all oils and gases," "all subterranean substances and products," "exclusive rights-of-way for any and all railroads," "pipe lines, telephone and telegraph lines that may hereafter be located on said land," "exclusive right to enter upon said land and drill thereupon for oil and gas," "use and operate the said land and surface thereof and any and all parts thereof, including the right to use, divert, dam and pollute water courses thereon," "and also the right to build, erect, alter, repair, maintain and operate upon

said land and at its option to therefrom remove, any and all houses, shops, buildings, tank, derricks, inclines, tipples, dams, coke-ovens, store and ware rooms, and machinery and mining and any and all equipment," "and the right to dump, store and leave upon said land any and all muck, bone, shale water or other refuse from said mines," "and the right to erect upon said land and maintain, use, repair and operate, and at their pleasure remove therefrom, any and all buildings and structures, and machinery and mining and any and all equipment, whether specifically enumerated herein or not." Also in exercising their right to the mineral estate the grantee was "released from any and all liability or claim of to the said parties of the first part, their heirs, representatives and assigns (surface owner), occasioned by or resulting directly or indirectly from such use or occupation . . . " (App. 3a-5a). This type of broad form deed is typical of the deeds that separated the mineral rights from the surface rights. See also H. Caudill, *Night Comes to the Cumberlands*, p. 72-75 (1963). One source has estimated that in ninety per cent of the land in the Eastern Kentucky counties of Bell, Harlan, Letcher, Perry, Knott, Pike, and Floyd title to the mineral estate has been severed from the general surface by these kind of deeds. In counties of Knox, Whitley, McCreary, Leslie, Lawrence and Morgan, a lesser percentage is similarly affected. Brief for appellants at p. 2, *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968). These type of mineral deeds are common throughout the coal fields of Pennsylvania, West Virginia, Ohio, and Tennessee and other states. Significantly though the broad form deed has been differently interpreted in

Kentucky than in any other state by the highest court in Kentucky.

In *Buchanan* v. *Watson*, 290 S.W.2d 40 (Ky. 1956) the Kentucky Court of Appeals first significantly interpreted the broad form mineral deed. The trial court had held that under the broad form deed coal could be removed by strip mining but damages had to be paid to the surface owner for destruction to the surface of the land and the timber thereon. After first affirming the decision of the lower court, on a Petition for Rehearing, the Kentucky Court of Appeals reversed its original decision and held that the owner of the mineral estate could strip mine without liability unless he exercised this power "oppressively, arbitrarily, wantonly or maliciously." *Buchanan* at p. 43. Even though the court recognized that the original parties to the broad form deed had not contemplated strip mining, stripping was permitted, the court ruled, since it was the only feasible and economical way to mine the coal; ambiguity in a deed is always construed strongly against the grantor; the all-inclusiveness of the deed and a waiver of surface damages created a dominant estate in the holder of the mineral estate; and the court concluded by saying,

> The validity of a waiver of damages has become so firmly established that it is a rule of property law governing the rights under many mineral deeds concerning much acreage in Eastern Kentucky. *To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow.* (Emphasis added.) *Buchanan*, supra at 43-44.

In *Blue Diamond Coal Co.* v. *Neace*, 337 S.W.2d 725 (Ky. 1960), the Kentucky Court of Appeals further in-

terpreted the broad form deed. The Trial court in *Blue Diamond* believed that *Buchanan* would not last long and stated:

> The Court however, is of the opinion that . . . Buchanan v. Watson . . . is too harsh, and that the Court of Appeals will . . . modify or reverse that opinion. This court knows every Judge and Commissioner on the Court of Appeals and he knows that they are not cruel or cold hearted men, and it is his opinion that they, however, have not seen the havoc or devastation that has been brought and reaped upon many of the small property owners . . . and with very little, if any, effort on the part of the operators in alleviating or minimizing that havoc or distress . . . Record, p. 85; Brief for Appellant, p. 4, in the *Blue Diamond* case.

The Court of Appeals in *Blue Diamond* extended *Buchanan* and held that owners of mineral rights were immune from damages to the surface and minor improvements caused by auger mining even where underground mining was feasible. The court stated:

> Right or wrong, it would be a grave matter indeed for this court by overruling *Buchanan* now to upset property rights which have since vested in reliance upon it. *Blue Diamond,* supra, p. 728.

The Kentucky Court has reaffirmed the *Buchanan* decision in cases since *Blue Diamond* in *Kodak Coal Co.* v. *Smith,* 338 S.W.2d 548 (Ky. (1960); *Ritchie* v. *Midland Mining Co.,* 347 S.W.2d 548 (Ky. 1961); *Blue Diamond Coal Co.* v. *Campbell,* 371 S.W.2d 483 (Ky. 1963); *A. J. Croley* v. *Round Mountain Coal Co.,* 374 S.W.2d 852 (Ky. 1964).

The latest decision by the Kentucky Court challenging the interpretation of the broad form deed was *Martin* v. *Kentucky Oak Mining Company*, 429 S.W.2d 395, (Ky. 1968). The deed in *Martin* had a waiver of damages similar to the present case. The lower court had ruled that the mineral owner could remove coal by strip or auger mining methods but that he must pay damages to the surface owner for any destruction of the surface. The main contention of the owners of the surface rights was,

> . . . that the broad form deed does not mean, and could not reasonably have been intended to mean, when it grants to the mineral grantee the right to use the surface of the land "as may be necessary or convenient to the exercise and enjoyment of the property rights and privileges hereby . . . conveyed," that the use, regardless of old or new methods, could be such as to destroy the value of the surface for agricultural or residential purposes. *Martin* at p. 397.

A four-to-three majority of the Kentucky Court ruled that the owner of the mineral right was entitled to strip mine, and furthermore, was not liable to the owner of the surface rights for damages to the surface unless the mining was conducted in a "wanton, malicious or arbitrary manner." As to the arguments of the surface owners the majority stated,

> . . . they do not have the overwhelming force necessary to prevail against the lone entrenched rule of our previous cases in reliance upon which property rights have vested. *Martin* at 399.

The dissent in *Martin* emphasized that the main question in interpreting the deed was the intention of

the parties who signed the deed in 1905 and whether the practice of strip mining was in use. They contended that strip mining was neither heard of nor dreamed of in 1905 and therefore the mineral rights owner had no right to remove coal by stripping. In revealing language, the dissent stated:

> I am shocked and appalled that the Court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof. *Martin* at 402.

The *Martin* holding represents the present state of Kentucky law concerning the legality and scope of the broad form deed.

Kentucky's legislative body, the General Assembly, passed the first strip mine legislation for the state in 1954 (Ky. Acts ch. 8 at 19, 1954), with the main requirements being that strippers must cover the face of the coal and grade spoil banks where practicable. Subsequent amendments to the law were passed in 1962 (Ky. Acts, ch. 105 at 400, 1962) and 1964 (Ky. Acts, ch. 51 at 228, 1964). Then in 1966 the basic strip mining law that is in effect today was passed by the Kentucky General Assembly. In 1972 there were some changes made to the 1966 law. The law is all-encompassing and practically totally regulates the strip mining industry. A Reclamation Commission in the Kentucky Department of Natural Resources, was first authorized but in 1972 the Commission was abolished and a new Department of

Environmental Protection was set up with a Division of Reclamation within it. The Department of Environmental Protection has the power to conduct investigations, hearings and adopt regulations concerning the strip mining industry; to order remedial measures for those not complying with the law, and to revoke strip mining permits when there is non-compliance. K.R.S. 350.028. K.R.S. 350.032 gives the Department of Environmental Protection the power to seek judicial enforcement of its subpoenas and also authorizes judicial review of any rulings by the department. The Division of Reclamation within the department supervises and enforces the strip mining laws; examines and approves plans and specifications submitted by strip mine operators as to their method of operation, backfilling, grading and for the reclamation of area stripped; orders suspension of strip mining permits for failure to comply with laws and regulations; and orders stopping of any mining operation that has begun without first securing a permit to strip from the division. K.R.S. 350.050. Unless the operator first obtains a permit, as well as gives complete information as to the location of the land, the owners of the surface rights, the owners of the coal to be mined, his address, along with a comprehensive United States geological survey topographic map, he will be denied a stripping permit. K.R.S. 350.060. A fee is required for the permit as well as a performance bond conditioned on compliance with state laws and regulations. Permit applications are to be denied if the mine operator cannot fulfill the law requirements as to backfilling, grading or reclamation; landslides or acid water pollution cannot be prevented; houses, schools, churches, etc. will be

threatened. K.R.S. 350.085. Comprehensive plans must be submitted to insure that the method of operation, backfilling, grading and reclamation of the area does not damage the public and their property, roads and streams. K.R.S. 350.090. After the backfilling and grading has been completed and approved by the division the operator shall restore the land by planting trees, shrubs, grasses and legumes on the land stripped. K.R.S. 350.095. K.R.S. 350.130 sets forth the procedure by which operators are informed of their noncompliance with the strip mine laws and regulations and the fact that if an operator has repeatedly been in noncompliance more than three times, he will not be issued any additional permits.

The 1974 Kentucky General Assembly passed additional strip mine legislation to go into effect January 1, 1975. The new legislation broadens the state regulatory scheme over strip mining, but the most important new regulation prohibits strip mining where the surface owners refuse to give their written consent (App. 31a-32a).

The coal company respondents will be prohibited from strip mining on the Watson land after January 1, 1975, but this will not compensate for the land destruction prior to the effect of the new law.

Also pursuant to K.R.S. 350.028 additional and more comprehensive regulations have been authorized by the Division of Reclamation. The division has promulgated regulations more specifically defining required access roads to the area to be stripped (Strip Mine Regulation (SMR-5), backfilling, grading, reclamation and methods of operation (SMR-6), permits and reclama-

tion plans (SMR-7), vegatative cover and standards for evaluating vegatative cover (SMR-8), pre-planning for contiguous mining areas (SMR-9), blasting (SMR-10), water quality (SMR-11), and water impoundments (SMR-12)).

This Court should grant certiorari and decide whether the all-encompassing state regulations over the strip mine industry coupled with state court decisions on all fours with the present factual situation upholding the broad form deed and giving the mineral rights owner preference over the surface owner in state action. This issue needs to be decided by this Court not only for the sake of the present litigants but for all land owners in Kentucky and perhaps other states who have had their land destroyed by coal companies. All land owners in Kentucky, especially eastern Kentucky, whose mineral estate has been taken from them by a broad form deed, need to receive compensation.

In the past the courts have extended the meaning of state action to include many things that it would not obviously include. The extension of this doctrine has undertaken to extend the coverage of the Fourteenth Amendment to actions which were previously thought of as private action by private citizens. The test of state action has never been hard and fast.

> Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance . . . cases make clear that the impetus for the forbidden discrimination need not originate with the state if it is State action that enforces privately originated discrimination. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 173, (1972).

Other cases have helped to define the illusive doctrine.

> A private person does not act under color of state law unless he derives some "aid, comfort, or incentive," either real or apparent from the state . . . . We believe that affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy to bring the statute (fourteenth) into play. *Lucas* v. *Wisconsin Electric Power Co.*, 406 F.2d 638, 655, 656.

Prior to 1943, this doctrine had already been extended to include the acts of state officials under the color of law doctrine, and the acts of private persons who were instrumentalities of the state as state action. (The Impact of *Shelley* v. *Kramer* on the State Action Concept, 44 Cal. L. Rec. 718, 719; 1956.) Later the instrumentality theory went so far as to include the acts of a private corporation as state action where the private corporation governed the citizens so as to restrain their fundamental liberties (*Marsh* v. *Alabama*, 326 US 501; 1946), and to include the acts of a restaurant owner where the restaurant space had been leased by the state through the local parking authority (*Burton* v. *Wilmington Parking Authority*, 365 US 715; 1961).

Where state licensing is involved the acts of the licensee are state action and therefore if the licensee violates the taking clause of the Fifth Amendment, the state is responsible for these violations. In *Lombard* v. *Louisiana*, 373 US 267 (1963), Justice Douglas concurring stated that,

> State licensing and surveillance of a business serving the public also brings its service into the public

> domain. This restaurant needs a permit from Louisiana to operate; and during the existence of the license the state has broad powers of visitation and control. This restaurant is thus an instrumentality of the state since the state charges it with duties to the public and supervises the performance. *Lombard*, supra, pp. 280-283.

This is exactly what we have in the present situation where the state grants permits to operate, can revoke the permits for non-compliance with state laws and regulations, approves plans for strip mining operations, orders and supervises reclamation, requires a performance bond conditioned on compliance, and a host of other compulsory state requirements before the strip miner can operate in the state. If an operator is in non-compliance more than three times, the state will deny him the right to strip mine. So extensive is the state involvement that strip mining is no longer a right but a privilege granted by the state. See also *Seidenberg* v. *McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (USDC, SDNY, 1969); *Smith* v. *Holiday Inn*, 336 F.2d 630 (1964); *Meredith* v. *Allen Co. War Memorial Hospital Commission*, 397 F.2d 33 (1968).

In *Moose Lodge*, supra, this Court held that possession of a state liquor license by a fraternal lodge (private club) that engaged in racial discrimination did not constitute state action. The argument that the state was significantly involved in the discrimination failed because

> . . . the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it

> licenses to serve liquor . . . *Moose Lodge*, supra at 175.
>
> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination . . . at 176.
>
> Operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge so as to make the latter state action within the ambit of the Equal Protection Clause of the Fourteenth Amendment . . .at 177.

There is state action in the case at bar precisely because the state regulatory practices are specifically directed at the destructive aspects of strip mining and not a regulation by the state of a peripheral aspect of strip mining. In the case at bar there is significant state regulation of the specific practice that is alleged to be illegal. In *Moose Lodge* there was no state approval in any way of the racial discrimination by the club. In the case at bar the state approves the strip mining by allowing it to continue and certainly the Kentucky Court of Appeals approves of such mining by granting favorable and even preferential rulings to the industry.

In *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, where a privately owned public utility that was regulated by the Public Utilities Commission was sued for installing music in its street cars, this Court held there was sufficient government involvement to make the First and Fifth Amendments applicable to the private utility's action. The *Pollak* situation is very similar to the case at bar. Both the utility and the coal

companies were private corporations. Both were heavily regulated by the state. The key aspect of regulation by the state in *Pollak* was regulation of the alleged harm, that being the music. The state approved of the music on the street cars. It was the music that the two street car riders disapproved of and sued to eliminate. Similarly it is the strip mining practices that the plaintiffs are trying to stop that the state has approved and encouraged.

In regard to state court action it was decided as early as 1878 that,

> If compensation for private property taken for a public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment. *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 US 226, 235 (1897).

The case of *Shelley* v. *Kraemer,* 334 US 1 (1948), seventy years later represented a major step in the extension of the state Court action doctrine. In this case the owners of property with racially restrictive convenants were suing to enjoin the Negroes who had bought homes which were subject to the same racially restrictive covenant from taking possession and title of the homes they had bought.

> Here the particular pattern of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance by the terms of agreements among private individuals. *Shelley,* at 13.

> Nor is the amendment ineffective simply because the particular pattern of discrimination which the state has enforced, was defined initially by the terms of a private agreement. *Shelley*, at 20.

The Court took a major step here in determining that judicial enforcement of private discrimination is prohibited by the Fourteenth Amendment and is state action. The Court also stated,

> But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. *Shelley* at 17.

Later cases have also upheld this extension of the state court action doctrine. *Barrows* v. *Jackson*, 346 US 249 (1953) affirmed the holding in the *Shelley* case, saying that damages could not be sustained against a co-covenator who sold to a Negro. *Bell* v. *Maryland*, 378 US 266 (1964), held that there was state action where a state court upheld the conviction for trespass of twelve Negroes who attempted to integrate a segregated private luncheon counter, and in *New York Times Co.* v. *Sullivan*, 376 US 254 (1964), the Court found that the state rather than Sullivan had deprived the New York Times of freedom of speech by upholding Sullivan's

claim for libel against the New York Times. It was found to be sufficent grounds for state action that the Common Law rule was applied to mediate conflicting claims of right between private parties. In *Evans* v. *Newton*, 382 US 296 (1966), this Court found that there was state action when the state court substituted private trustees for a park that was for the needy run by city trustees. A later Federal Appeals Court aptly summarized the state court action principle.

> There is no doubt today that judicial action in private disputes is a form of state action required for application of the amendment. In *Shelley* v. *Kraemer* and *Barrows* v. *Jackson*, the Supreme Court found that equal protection would be denied if a court enforced, or awarded damages for the breach of an agreement under which property would not be sold to non-caucasians. The application of a rule of law such as the common law of libel applied by the lower courts in *New York Times Co.* v. *Sullivan*, which penalizes a person for the exercise of a constitutional right is a violation of the fourteenth amendment and a court cannot award damages under it. *Hosey* v. *Club Van Cortlandt*, 299 F.S. 501, 506.

It is contended that the case *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (1968), decided by the Kentucky State Court of Appeals, constitutes state action which makes the state responsible for the acts of the strip mine operators. Without the authority of *Shelley* and the cases that followed it, such a contention would be ridiculous, but based on such authority the argument is valid. The *Martin* case held that under the broad form deed which had conveyed the mineral rights to the

defendant of the property owned by the plaintiff, the defendant could use the method of strip mining to remove the minerals although it destroyed the plaintiff's property and although this method of removal of minerals had not been contemplated at the time the mineral rights were conveyed. As a result of this decision, the coal company respondents are permitted to strip mine under the broad form deed and this strip mining results in such harm to the Watson family that it constitutes a taking of property in violation of the Fifth and Fourteenth Amendments. This taking of property is a state taking for the following reasons. First, it has been determined that a final judgment of the state court, under the authority of which the property is in fact taken, is to be deemed the act of the state. In *Shelley* this holding was determined pursuant to a state statute, but it is logical that state action can also be found pursuant to a private agreement that is enforced by the highest state court where this enforcement results in a violation of the Fourteenth Amendment. In the case at hand, the state court has enforced a private agreement in such a way as to result in a violation of the Fourteenth Amendment by way of the Fifth Amendment taking clause. The necessary affirmative action by the state can also be found in this state court decision as the dissent in the *Martin* case so well stated,

> I am shocked and appalled that the court of last resort in the beautiful State of Kentucky would . . . lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof. *Martin*, supra. Hill dissent at 402.

In addition to the preceding arguments showing state involvement, the Kentucky Court of Appeals has further enabled and enhanced the efficacy of the challenged activity by enlarging the legal rights of strip miners under the broad form deed, and in effect legalized the broad form deed. No other state gives strip miners such a free hand under the broad form deed and allows this kind of mining. See *Wilkes-Barre Township School District* v. *Corgan*, 170 A.2d 97; *Merrill* v. *Manufacturers Light & Heat Co.*, 185 A.2d 573; *New Charter Coal Co.* v. *McKee*, 191 A.2d 830; *Oresta, et al.* v. *Romano Brothers*, 73 S.E.2d 622; *Brown* v. *Croger Coal & Land Co.*, 107 S.E.2d 777; *United States* v. *Polino*, 131 F.S. 772 (N.D.W. Va.); *Franklin* v. *Callicoat*, 119 N.E.2d 688; *Barker* v. *Mintz*, 215 P.2d 534; *Benton* v. *United States Manganese Corp.*, 313 S.W.2d 839; *Carson* v. *Missouri Pacific Railroad Co.*, 209 S.W.2d 97; *Campbell* v. *Campbell*, 199 S.W.2d 931. If the Watson family land was in West Virginia or Pennsylvania, they could legally prevent the coal companies from stripping on their land. There is a strong disagreement among states as to the legality and validity of the broad form deed.

What the Kentucky court has done is to grant a right that was not there to begin with and legalize the destruction and taking of surface owners' property. The parties to the broad form deed in the present case never intended nor contemplated strip mining methods being used on the land and in effect destroying the land. Nowhere in the deed was the word strip mining mentioned (App. 3a-5a). What was mentioned in the deed was the word "mining" and it is incumbent to determine

what the ordinary meaning of the word was when the deed was signed. At the turn of the century, the state of technology was such that the surface and mineral estates were compatible since underground mining was the primary method of mining. As the dissent in *Martin* at 401 stated, strip mining was not contemplated nor in practice at the time of the signing of these deeds.

Authorities contemporaneous with the period show what kind of mining methods were used. In 18 R.C.L. Mining and Minerals, Section 2 (work published in 1917) the following appears:

> A "mine" in its specific sense is a work for the excavation of minerals, by means of *pits, shafts, levels, tunnels,* et cetera, as opposed to a quarry where the whole excavation is open. It has been said that whether any excavation be a mine or not depends on the mode in which it is worked, and not on the substance obtained from it. As originally used, the word "mine" was *exclusively connected with underground* workings . . . (Emphasis added.)

In 27 Cyc. Mining and Minerals, Section 532 (work published in 1907), the following appears:

> The primary meaning of the word "mine", standing alone, is an underground excavation in the earth from which metallic ores or other mineral substances are taken by digging.

In *Barton* v. *Wichita River Oil Co.,* 187 S.W. 1043 (1916), Webster's primary definition of the word "mine" is said to be "an excavation, properly underground, for digging out some useful product, as ore, metal or coal." It is clear from these authorities that at the time of the

signing of the deed the ordinary or popular definition of mining was confined to underground excavations. In 1905 the term "mining" did not embrace the process of extraction of coal by stripping. The fact that one method of mining today is stripping does not mean that the term "mining" embraced this method in 1905. Cases in states other than Kentucky hold that any deed dated prior to the introduction of strip mining into an area which does not specifically authorize the practice and which severs the mineral estate from the surface estate cannot be held to allow strip mining. In *United States* v. *Polino,* supra, the Federal Court construed a 1917 deed which granted surface rights to the government but reserved the mineral rights to the grantor. In refusing to permit the mineral owner to strip mine, the trial judge stated:

> In order for a usage or custom to affect the meaning of a contract in writing because it is within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time of the contract's execution. At 775.

See also *West Virginia-Pittsburg Coal Co.* v. *Strong,* 42 S.E.2d 46, 49; *Stewart* v. *Chermicky,* 266 A.2d 259; and *Wilkes-Barre Township School District* v. *Corgan,* supra. By every rule of contract construction, including construction of deeds, the intention of the parties is the ultimate question for the interpreter. 17 A C.J.S. *Contracts* §295 (1963). It is inconceivable that the surface owners would have authorized the destruction of their land.

The Kentucky Court in granting the strip mine operators dominant authority over surface owners has

given them a privileged position even superior to individuals who own oil rights. In *Wiser Oil Co.* v. *Conley*, 346 S.W.2d 718 (1961), the court held that parties to a 1917 lease intended that the oil should be produced by drilling in a customary manner prevailing when the lease was executed, and the holders of the lease would be liable to the surface owner for damage to the surface of the land and coal thereunder resulting from the use of a "water-flooding" method to increase the oil production. "Water-flooding" was a new method of extracting oil that was highly destructive to the surface. The court held that the right "to use all means and appliances on or off these premises to secure and facilitate the production of the oil and gas" and the fact that all of the oil was conveyed did not give the mineral holder the right to destroy the surface. *Wiser* at 720. The court in Wiser stated:

> Even though appellants assert that the water flooding process was known prior to March 10, 1917, the date of the execution of the lease, and it was employed to some extent in other states before that time, we conclude that it was the intention of the parties that oil should be produced by drilling in the customary manner that prevailed when the lease was executed. Any exemption from liability would, therefore, be limited to the damage which might be caused by this contemplated means of bringing oil to the top.

The Kentucky Court in *Martin* fell far short in reconciling the differences with the *Wiser* decision.

> It is suggested that the court in *Wiser Oil Co.* v. *Conley* did depart from the principles of *Buchanan*

> v. *Watson*, in respect to oil rights . . . Perhaps *Wiser* is distinguishable from *Buchanan* on some basis other than that stated in the opinion in *Wiser*, or perhaps it is a departure from *Buchanan*. In any event we do not feel compelled in this opinion to explain, justify, reconcile or distinguish *Wiser*. The Court has decided to adhere to *Buchanan* whether or not it conflicts with *Wiser*. *Martin* at 399.

There is no other way to justify the different rulings except that the Kentucky Court has decided to give strip mining interests a privileged position. Until the advent of massive strip mining in the State of Kentucky the surface owner did not have to worry about his land being destroyed by mining practices. Mining practices did not have that right up until that time. The Court of Appeals of Kentucky stated in 1927:

> The right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil and this right of support is absolute and not dependent upon any question of negligence. *West Kentucky Coal Co.* v. *Dilback*. 294 S.W. 478, 479 (1927).

It is only after World War II when the strip mining industry became powerful in the State that the Kentucky Court of Appeals legalized such practices under the broad form deed.

What the Kentucky State Government has done through its judiciary, by judicial interpretation, and its legislature, by regulating the activity, is allocate certain powers in support of private individuals and private entities that they would not have had without the support of the branches of state government. See *Reitman* v.

Mulkey, 387 US 369 (1967). This "grant of power" has put the strip mine operator acting under a broad form deed in a preferred status which has derived solely from the government's allocation. As this Court wrote in *Nixon* v. *Condon*, 286 US 73 (1932), "If the State had not conferred it, there would hardly be color of right to give a basis for its exercise." at 85. If the Court of Appeals of Kentucky had not legalized the questioned activity, it could not be practiced. For there to be state action the challenged activity must be the specific exercise of power granted by the government. The decisions by Kentucky's highest court have actually increased the powers or status of the challenged activity. See *Burton* v. *Wilmington Parking Authority*, 365 US 715 (1961), Justice Stewart's concurrence at 726, Harlan's dissent at 728, 729. Statutes or judicial decisions that enlarge common law rights given a protected status amounts to authorization. See *Adickes* v. *Kress*, 398 US 144, 201-2 (1970), J. Brennan concurring and dissenting in part. Court enforcement of the right constitutes state action. *Shelley* v. *Kramer*, supra. See also *Bell* v. *Maryland*, 378 US 226 (1964), J. Goldberg concurring opinion, 296-300.

In *Reitman* v. *Mulkey*, supra, this Court made an analysis turning upon the nature of the protection afforded existing common law rights. The Court found state involvement in discrimination by private landlords by virtue of an amendment to the state constitution, adopted by state-wide referendum, protecting the absolute freedom of real property owners to refuse to sell, lease or rent residential properties to anyone and for any reason. The amendment effectively repealed fair housing laws, under which plaintiffs' allegations of dis-

crimination were raised. While the opinion suggested that the state had encouraged discrimination (387 US at 380), its position relied most heavily upon the constitutionalization of the right to discriminate.

> Private discriminations in housing were now not only free from the fair housing laws, but they also enjoyed a far different status than was true before passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter . . . *Reitman* at 376-77.

See also *Railway Employees' Dep't* v. *Hanson*, 351 US 225 (1956) and *Int'l Ass'n of Machinists* v. *Street*, 367 US 740 (1961), where the Court emphasized its constitutional concerns with Congress' involvement in union discrimination through statutes which codified the right of employees and employer to bargain for union shop, state statutes notwithstanding. This right to bargain for union shop was a common law right, but the protected status it acquired in Federal legislation superseding contrary state laws was decisive of government involvement. See also *Hunter* v. *Erickson*, 393 US 385 (1969).

II

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER STRIP MINING WHICH DESTROYS THE SURFACE OF THE LAND, WITHOUT THE SURFACE OWNER'S CONSENT, AND WHERE NO COMPENSATION IS PAID TO THE SURFACE LAND OWNER, CONSTITUTES AN UNJUST TAKING WITHOUT JUST COMPENSATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

What respondents' strip mining has done to the Watson land and what strip mining has done to the land throughout eastern Kentucky even after the so-called tough 1966 strip mine law was passed by the Kentucky General Assembly was aptly described by the Attorney General of Kentucky in an opinion to the Division of Reclamation (Opinion of Attorney General, OAG, 70-563, August 24, 1970). His office had conducted a fact-finding tour to ascertain the strip mine problem and stated:

> The basic nature of the steep slopes of eastern Kentucky suggests resistance to and in some instances, defiance of satisfactory containment and reclamation, as evidenced by slides, eroding and sliding mountainsides and disappearing silt-laden streams.
>
> Water damage was apparent from flooding and acid runoff sufficient to kill aquatic and wild life. The latter condition was more frequently observed in western Kentucky, and may well have generally antedated the 1966 amendments to the Act. Excess silting is a major consequence in eastern Kentucky . . .

At a site in Johnson County following a heavy rain, a mountain slide toppled a dwelling from its foundation so suddenly the occupants were unable to remove anything other than themselves.

In Knott County it was reported that a massive rock dislodged and rolled down the mountainside, crossing a public road and missing the regularly scheduled school bus on its daily run.

In Perry County near Lott's Creek a mountain slide filled a creek bed, flooded the bottom land to the floor level of a nearby dwelling, destroyed the channel and blocked the highway—again one travelled by school buses. At the time of the tour a crew was busily engaged with a shovel and dragline, bulldozer and chain saw, completing the reconstruction of a new channel, absent bend, bank or trees.

In Harlan County we were shown a creek where silt, rock and debris in the stream bed had risen to the level of the bridge crossing the creek.

In Leslie County members of the tour scaled to what once was a mountain top, to find no growing thing. The stripping operation was proceeding, layer-by-layer, seam-by-overburden-by-seam, with the residue cascading down the hillsides. At the first wash it could only fall to the bottoms below.

It was reported that on December 8, 1968, a landslide at Coal Rul, Kentucky, blocked the road for two months, diverting the creek into the bottom lands, necessitating the carrying in of food on foot across the slide.

As though by way of emphasis, on August 3, 1970, in Seco, Kentucky, a landslide was reported as spilling mud, water, rocks, tree stumps and other debris onto a roadway leading to Seco's residential sections. The landslide came, as silt basins washed out, just a few days after a protest petition against

> strip mining, signed by most of Seco's residents was submitted to the Reclamation Division. It was further reported that this situation arose despite the fact that the operators were in compliance with the Division's regulations . . . *OAG*, supra, pp. 781-782.

The attorney general's opinion on the horrible results of strip mining adequately describes what strip mining has done to the Watson land as well as what has happened to land throughout eastern Kentucky.

Under any of the several tests the courts have devised to determine what is a taking without just compensation, strip mining of the Watson land qualifies. The main theories developed are the physical invasion test and the diminution of value test. The physical invasion test includes both a strict and more relaxed view of what constitutes a physical invasion. The more stringent view dates back to the case of *Transportation Co.* v. *Chicago*, 99 US 635 (1878), where it was held that no taking of property occurs unless there is physical encroachment and occupation of the property. Another leading case which subscribed to this same theory was *United States* v. *Central Eureka Mining Co.*, 357 US 155 (1968). In this case the Court held that there was no physical invasion when the government closed down the gold mines because the government did not occupy, use or in any manner take physical possession of the gold mines.

The rigid test of physical invasion was often accompanied by a corollary proposition that the elimination of a noxious use did not constitute a taking, whereas the elimination of an innocent use did constitute a taking.

This theory was illustrated in *Mugler* v. *Kansas*, 123 US 623 (1887), where the Court held that the prohibition of the sale of liquor which destroyed the plaintiff's business was not a taking because there should be no compensation when a plaintiff is no longer permitted to carry on a noxious use.

The less stringent view of the physical invasion test was not a later development as might be expected, but rather ran right alongside in time sequence of the more stringent view. This view recognized that physical invasion was possible where actual physical occupation of the premises did not occur. The leading case is *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), where a dam authorized by a state statute overflowed 640 acres of the plaintiff's land. The Court determined that there was a taking on the basis that there was serious interruption to the common and necessary use of the property. This theory was extended in *United States* v. *Kansas City Life Insurance Co.*, 339 US 799 (1950), where the United States had destroyed the agricultural value of the plaintiff's farm by keeping the Mississippi River at a high level. The Court held that the resulting destruction of the agricultural value of the land, without actually overflowing it, was a taking of private property. Two other cases involving overflights over people's homes advocated this same view of the physical invasion test. *United States* v. *Causby*, 328 US 256 (1946), *Griggs* v. *Allegheny County*, 269 US 84 (1962).

The second major test which the courts have used to determine what constitutes a taking is the diminution of value test. There are also two views of this test. The first view is that where there is a valid exercise of the police

power the diminution of value resulting from this exercise is inconsequential. The second view is that of a balancing between the police power and the resulting diminution of value and under this test when the harm becomes too great the act is deemed to be one of eminent domain, and compensation will be required.

This first test can be viewed as an absolute test as it will never allow compensation no matter how great the resulting injury is. The case of *Munn* v. *Illinois*, 94 US 113 (1876), was the first case to define the boundaries of the police power. The Court decided that where private property is devoted to a public use, it is subject to public regulations. The case of *C'Note* v. *City of New Orleans*, 177 US 587 (1901), held:

> The exercise of the police power often works pecuniary injury but the settled rule of the court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of police character . . . Such laws do not appropriate private property for public use but simply regulate its use and enjoyment by the owner . . . he will be compensated for it by sharing in the general benefit which the regulations are intended and calculated to secure. at pp. 598, 599.

The case of *Hadecheck* v. *Sebassion*, 239 US 394 (1916), affirmed the view of *C'Note* that regulation is not precluded by the fact that the value of the investment made in the business prior to any legislative action will be greatly diminished. *Village of Euclid* v. *Ambler Realty*, 272 US 365 (1926), followed the same type of reasoning in holding that a zoning ordinance was valid although it might have been held arbitrary and op-

pressive a century ago because of the complex conditions existing today.

The balancing as opposed to the absolute view of the diminution of value test has equal authority behind it. One of the first cases which followed this theory was *Interstate Consolidated Street Railway Co.* v. *Commonwealth of Mass.*, 207 US 79 (1907). In this case the Court found that a statute requiring a one-half rate for school children on the local railroad was a valid exercise of the police power, but the Court stated that if the magnitude of the burden imposed had been too great, compensation would have been required. This doctrine has been upheld in later cases. *Friendship Cemetery* v. *City of Baltimore*, 81 F.2d 57 (1951), *United States* v. *Central Eureka Mining Co.*, 357 US 155 (1958). In *Armstrong* v. *United States*, 364 US 40 (1950), the Court held that the complete destruction of one's property constituted a taking for which compensation was due. The taking resulted from the government's sovereign immunity which made the plaintiff's lien against property which the government had taken unenforcible, and therefore totally worthless.

The purpose of the taking without compensation clause of the Fifth Amendment as stated in three cases ranging from 1871 to 1960 seems to have remained fairly constant over the years. In *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), the Court said that this constitutional provision was adopted for the protection and security of the individual against the government. In *United States* v. *Willow River Power Co.*, 324 US 499 (1946), the court said:

> The Fifth Amendment which requires just compensation where private property is taken for a public use undertakes to redistribute certain economic losses inflicted by public improvement so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. at p. 502.

And in 1960 the Court said the

> Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole. *Armstrong* v. *United States,* 364 US 40, 49 (1960).

See also Sax, "Takings and the Police Power," 74 Yale L.J. 36, 48 (1964). All of these statements about the taking clause of the Fifth Amendment seem to be saying that the amendment was intended to protect the individual from unjust loss.

The less stringent approach to the physical invasion test does not require actual possession or invasion of the property, but only requires that there be serious interruption to the command and necessary use of the property, or a direct and immediate interference with the use and enjoyment of the surface owner's property. The dust, landslides, pollution of the streams and creation of desert land where nothing can grow that result from strip mining have destroyed the Watson families' use and enjoyment of their property. Their home and the agricultural use of their land are almost destroyed; the contaminated water of nearby streams add to this destruction and their enjoyment of living in mountain

splendor has been destroyed after the stripping has gouged their land. The physical invasion cases of *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), and of *United States* v. *Kansas City Life Insurance Co.*, 339 US 799 (1950), where the destruction of agricultural land were deemed to be takings of property are analogous to the strip mining situations. The overflight cases of *United States* v. *Causby*, supra, and of *Griggs* v. *Allegheny County*, supra, are also similar to this situation as the harms of the overflights includes nervousness and fear on the part of the inhabitants, just as strip mining on the hill above one's home in terms of noise, dirt and the possible dangers that will result, cause similar fear and nervousness on the part of the Watson family.

The diminution of value test in terms of the balancing approach is also easily met. This test requires that the value of the property be devalued to a large extent in order to find that there has been a taking of property. Land that has been strip mined loses all if not most of its value. In terms of resale value it is unlikely that anyone would buy gouged out land, where landslides occur frequently, where nearby streams are polluted and where even the flat land has lost any possibility of agricultural use. In terms of the value in the owner's eyes, it is obvious that he can no longer use the land for agricultural purposes or the nearby streams for fishing or water purposes, and it is likely that his enjoyment of what was once beautiful countryside will have diminished greatly.

After examining both of these tests in light of the facts, it is obvious that the tests are almost identical in a situation like the present case. They both boil down to the same fact that the Watson family does not own what

they once owned before their land was raped by the coal companies. They no longer have either the use or the enjoyment of their property and its value is greatly diminished. For all practical purposes, the result is the same as if the land had been physicially taken from them. The only logical conclusion is that strip mining per se constitutes a taking without compensation within the meaning of the Fifth Amendment.

CONCLUSION

The Watson family respectfully urges that this Court grant certiorari to review these serious and important issues that not only affect them but also reach hundreds of citizens of eastern Kentucky and may perhaps affect the lives of other citizens in other states in the near future.

Respectfully submitted,

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Attorney for Petitioner

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CONCLUSION

The Watsons have demonstrated that this Court should grant certiorari to review these serious and important issues that not only affect them but also reach hundreds of citizens of western Kentucky and may perhaps affect the lives of other citizens in other states in the near future.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A

No. 73-2234

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MITCHELL WATSON, MENIFEE WATSON, IDA MAE MULLINS, JUDGE WATSON, OLGA WATSON, NANILEA ROWE AND RANDOLPH WATSON *Plaintiffs-Appellants*

versus

KENLICK COAL COMPANY, INC., TIP TOP COAL COMPANY, INC., SHERMAN BAILEY, LEXIE BAILEY, J. W. HOWARD AND FLORENCE HOWARD *Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed June 21, 1974

Before PHILLIPS, Chief Judge, MILLER and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. Plaintiffs-Appellants ("the Watson family" or "the Watsons") claim that the destruction of surface rights in land owned by them incident to past and prospective strip mining by the defendants-appellees is actionable under 42 U.S.C. §1983. They sue for an injunction and damages. Specifically, the Watson family contends that appellees, who admittedly own the minerals in, on and under the Watson land, are acting under color of state law and depriving them of their property without due process and just

compensation, all in violation of the Fourteenth and Fifth Amendments.

District Judge H. David Hermansdorfer, finding no state action or constitutional deprivation, dismissed the complaint for lack of subject matter jurisdiction. His decision is reported at 365 F.Supp. 456 (E.D. Ky. 1973). We affirm.

The Watsons are private citizens who own the surface rights to certain land located in Magoffin County, Kentucky. Defendants-appellees, the Howards, are private citizens who own the minerals, including coal, in, on and under the land. The Howards derived their rights as remote successors in interest of a mineral severance grant or deed from the former owners-predecessors of the title to the Watsons. Defendants-appellees, the Kenlick Coal Co., Inc. and the Tip Top Coal Co., Inc., are lessees who engage in strip mining the land. Defendants-appellees, the Baileys, are officers of the coal companies.

The gravamen of the complaint is that the appellees, without the Watsons' consent, have been strip mining the land; and that these strip mining operations have resulted in the destruction of the Watsons' surface rights in the land and constitute a denial of due process and a taking of the land without just compensation. State action is premised upon the issuance of permits to strip mine by the Division of Reclamation, a division of the Kentucky Department of Environmental Protection, or, in the alternative, upon decisions of the Court of Appeals of Kentucky in unrelated cases.

A prerequisite to the vesting of federal jurisdiction for an alleged wrong under §1983 is the deprivation of a right guaranteed by the Constitution and laws of the United States. Such deprivation must be "under color of law." There must be state action. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 152, n. 7 (1970); *United States* v. *Price*, 383 U.S. 787, 794 n. 7 (1966). We find neither a constitutional deprivation nor state action.

Appellees have been strip mining the Watsons' land under authority of a "broad form" deed executed in 1905. The deed, which included a waiver of damages, severed the mineral rights from the surface estate thereby creating two distinct estates in the land by conveying the rights to:

> "all coal minerals and mineral substances and products; all oils and gases; all salt and salt mineral waters; all fire and potters clay; all iron and iron ores; all stone; all slate; all ores and mines; and all subterranean substances and products; and all combinations of same, or any or all of the same; situated, lying and being in, on or under the hereinafter described land, or that may hereafter be found thereon, therein or thereunder; and such of the standing timber thereupon as may, at any time of the use thereof, be, or by the party of the second part, its successors or assigns, be deemed necessary or convenient for mining purposes, or so deemed necessary or convenient for the exercise and enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed, including timber necessary for dams and railroads, or branch lines thereof, as may hereafter be constructed upon the said lands; and the exclusive rights-of-way for any and all railroads, tram roads, haul roads and other ways, pipe lines, telephone and telegraph lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives or assigns, or by the party of the second part, its successors or assigns, or by any person or corporation with or without the authority of either of said parties, their, or its heirs, representatives, successors or assigns; and also the right to maintain, keep in repair and operate the same and said railroads, tram roads, haul roads, ways, pipe lines, telephone and telegraph lines; and also the exclusive right to enter upon said land and drill thereupon for oil and gas, and to pump for and store the same upon said land, and remove pipe and transport the same therefrom; and to use and operate the said land and surface thereof and any and all parts thereof, including the right to use, divert, dam and pollute water

courses thereon in any and every manner that may, by party to the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, sold, granted or conveyed, including, but not limiting to, that of drilling, mining, pumping and therefrom removing or otherwise utilizing the said pipe, telegraph and telephone lines, rights-of-way, roads, ways, timber, coal, minerals, slate, oil, gas, salt water, clay, iron ore, mines, stone and subterranean substances and products thereof, and any and all other property and rights hereby bargained, sold, granted or conveyed, and for the transportation therefrom of said articles; and also the right to build, erect, alter, repair, maintain and operate upon said land, and at its option to therefrom remove, any and all houses, shops, buildings, tanks, derricks, inclines, tipples, dams, coke-ovens, store and ware rooms, and machinery and mining and any and all equipment, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property, rights and privileges hereby bargained, granted, sold or conveyed; and the right to thereupon convert, reduce, refine, store, dump and manufacture the said, or any or all of said property or products, in, upon or under said land, or other land owned, or hereafter acquired by said party of the second part, its successors or assigns, by purchase, lease or otherwise; and the right to dump, store and leave upon said land any and all muck, bone, shale, water or other refuse from said mines, wells, ovens or houses; and any and all matters and products that may be excavated from mines or produced by the exercise or enjoyment of any or all the property, rights and privileges hereby bargained, sold, granted or conveyed; and the right to remove all pillars and other lateral and subjacent supports without leaving pillars to support the roof or surface; and the

right to use said land for removal or storage of the products taken out of any other land owned, or hereafter acquired by party of the second part, its successors or assigns by lease or otherwise; and the right to erect upon said land and maintain, use, repair and operate, and at their pleasure remove therefrom, any and all buildings and structures, and machinery and mining and any and all equipment, whether specifically enumerated herein or not, that may, by party of the second part, its successors or assigns, be deemed necessary or convenient for the exercise or enjoyment of any or all the property, rights and privileges herein bargained, sold, granted or conveyed; and also the free access to, upon and over said land for the purposes of surveying and prospecting for said property and interests."

The Court of Appeals of Kentucky has held that a "broad form" deed gives the mineral owner the right to strip mine and subjects him to liability only if he exercises that right wantonly, oppressively, maliciously or arbitrarily. *See, e.g., Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395, 399 (1968); *Croley* v. *Round Mountain Coal Co.*, 374 S.W.2d 852, 854 (1964); *Blue Diamond Coal Co., Inc.* v. *Campbell*, 371 S.W.2d 483, 485 (1963); *Ritchie* v. *Midland Mining Co.*, 347 S.W.2d 548 (1961); *Kodak Coal Co.* v. *Smith*, 338 S.W.2d 699, 701 (1960); *Blue Diamond Coal Co.* v. *Neace*, 337 S.W.2d 725, 728 (1960); *Bevander Coal Co.*, v. *Matney*, 320 S.W.2d 301, 302 (1959); *Buchanan* v. *Watson*, 290 S.W.2d 40, 43 (1956).

The Watsons contend that this interpretation of the deed by the Kentucky Court of Appeals so as to authorize strip mining on their property has denied them due process and constitutes a taking without compensation because: 1) The Court retroactively has expanded and enlarged the mineral owner's rights under the deed; 2) the Court has given the coal miners a privileged position to the detriment of the surface

owners; and 3) the deed does not specifically authorize strip mining, and, indeed, strip mining was not contemplated at the time the mineral rights were conveyed.

As support for their argument that the Court of Appeals of Kentucky unconstitutionally has enlarged the rights conveyed by a "broad form" deed, appellants rely on *West Kentucky Coal Co.* v. *Dilback*, 219 Ky. 783, 784, 294 S.W. 478, 479 (1927), wherein the Court stated:

> "As we have said, the right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil, and this right of support is absolute and not dependent upon any question of negligence."

We fail to see how this case, which recites the general rule, lends support to the argument of the Watson family. The Watsons have assumed that they had rights under the "broad form" deed which were subsequently destroyed by decisions of the Court of Appeals of Kentucky. This assumption completely sidesteps the threshold question in this case, that is, did the Watsons' predecessors in title give up the rights that the Watsons now complain have been taken from them. Thus, the success of the Watsons' case depends on whether they possess rights under the deed which they complain have been taken from them. Under the common law of Kentucky, the predecessors in title to the Watsons gave up the right to prevent the appellees from strip mining.

The question of the rights and liabilities under a grant or deed is a question of state property law of which the federal courts can have no concern unless there is a violation of the Constitution or laws of the United States. *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927); *Tracy* v. *Ginzberg*, 205 U.S. 170 (1907). *Accord Evans* v. *Abney*, 396 U.S. 435, 439, 443-44 (1970). Absent an actionable violation, it is not the role of the federal judiciary to act as a super-

legislature by setting aside the property law of a state simply because we might consider the law to be unwise or harsh. To do so would constitute an abdication of the responsibility of federal judges "to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." 396 U.S. at 447. *See also North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). As stated by Mr. Justice Harlan in *Tracy, supra:*

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property with due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty. Within the meaning of that amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown

not to have unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'" 205 U.S. at 178.

These same principles were reaffirmed in *American Railway Express Co., supra,* wherein the Court stated:

> "The Kentucky court had jurisdiction and has determined only that under common law principles in the peculiar circumstances above narrated, where the facts were or might have been known to the purchasing corporation it became liable for claims against the vendor resulting from transactions within the State. The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' *Pennoyer* v. *Neff,* 95 U.S. 714, 733; *Booth* v. *Illinois,* 184 U.S. 425, 429; *Truax* v. *Corrigan,* 257 U.S. 312, 329.
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> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning,* 118 U.S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa,* 160 U.S. 389, 393; *Tracy* v. *Ginzberg,* 205 U.S. 170, 177; *Bonner* v. *Gorman,* 213 U.S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.,* 233 U.S. 665, 669." 273 U.S. at 273.

More recently, in *Evans, supra,* the Supreme Court addressed itself to this question of federal interference with state law. *Evans* was a case where the Supreme Court of Georgia had terminated a trust that had established a park open only to whites. The intent of the testator had been

specific in that only whites were allowed to use the park. The Georgia *cy pres* doctrine would not allow the Georgia courts to reform the trust, but rather would give effect to the desire of the testator to have the trust terminated instead of integrating the park. The Supreme Court affirmed, noting that there was no violation of any constitutionally protected rights because both whites and non-whites had been deprived of the use of the park. The effect of this decision, however, was to uphold state law that enforced clearly discriminatory provisions of a trust agreement. Justice Black, speaking for the Court, stated:

> "We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. 396 U.S. at 439.
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> "Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will. 396 U.S. at 444.
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> "The construction of wills is essentially a state-law question, *Lyeth* v. *Hoey*, 305 U.S. 188 (1938), and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs. *Id.*
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"In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. 396 U.S. at 445.

* * *

"What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust." 396 U.S. at 446.

We think the above quotations from *Evans, supra,* are equally applicable to the question presented in this case and reaffirm those principles set forth in *Tracy* and *American Railway Express Co., supra.* It is with these considerations in mind that we must examine alleged constitutional deprivation asserted by the Watson family.

Apparently, it is contended that the Court of Appeals of Kentucky has an improper motive with respect to mining deeds. The Watsons, in effect, argue that the Court has given the coal mining industry a privileged position in derogation of

the rights of surface owners. Reliance is placed upon *Wiser Oil Co.* v. *Conley*, 346 S.W.2d 718 (1960), wherein the Court refused to interpret an oil lease so as to authorize the surface destructive "water flooding" method of oil recovery to increase oil production. In that case the Court concluded that "it was the intention of the parties that oil be produced by drilling in the customary manner that prevailed when the lease was executed." 346 S.W.2d at 721-22. Appellants contend that the broad form deed should be interpreted so as to prohibit strip mining because it was not the customary manner of mining at the time the deed was executed. Indeed, it may not have been known at that time. By conclusory reasoning, the Watsons allege that but for the coal mining industries' privileged position, the deed would have been interpreted so as to exclude strip mining.

We do not find this argument to be persuasive. At least one distinction between *Wiser* and the strip mining cases is the deed itself. The broad form deed is a thorough denunciation of surface rights and, unlike *Wiser*, expressly includes a waiver of damages. Such a distinction, although the result may be considered to be harsh, does not show any improper motive on the part of the Court of Appeals of Kentucky.

Neither do we find that the Kentucky court was doing anything more than applying traditional concepts of deed construction that were neutral and of long standing. This is evidenced in *Buchanan* v. *Watson*, 290 S.W.2d 40 (1956), which was the first case significantly to interpret the broad form deed. The Court noted that the deed conveyed all of the coal in, on and under the land, did not contain any limitations or prohibitions on the method to be used to extract it, and contained an express waiver of damages. These considerations led the Court to conclude that the surface estate was subservient to the mineral estate. Applying the fundamental rule for deed construction that any ambiguity was

to be construed most strongly against the grantor and in favor of the grantee, the Court held that the deed authorized strip mining and would only allow damages if the right were exercised arbitrarily, wantonly or maliciously, *Id.* at 42-43.

The Watsons contend that a broad form deed could not authorize strip mining because "it is inconceivable that the surface owners would have authorized the destruction of their land." Additionally, much emphasis is placed upon the fact that, apparently, no other jurisdiction has interpreted a broad form deed so as to permit strip mining.

We do not find it helpful to the position of the Watsons that no other state court has interpreted a broad form deed to allow strip mining. Property law is, and must be, a creature of state law, with peculiar nuances in each jurisdiction. The rule in these strip mining cases evolved through custom and usage that were peculiar to Kentucky law and history. It is only when these rules are arbitrary or capricious or in clear conflict with fundamental principles of jurisprudence that a federal court may act. *American Railway Express Co., supra,* 273 U.S. at 273; *Tracy, supra,* 205 U.S. at 178. We are unwilling so to characterize the decisions of the Court of Appeals of Kentucky.

The recent case of *Martin* v. *Kentucky Oak Mining Co.,* 429 S.W.2d 395 (1968), shows the great extent to which the Court of Appeals of Kentucky has relied on historical data to interpret a broad form deed and fathom the intent of the parties. The deed in *Martin* was also executed in 1905 and dealt with land in Knott County, a county contiguous with Magoffin. The Court stated: "Of course in endeavoring to find the intent of the parties we must consider the situation and circumstances existing when the deeds were made." 429 S.W.2d at 397.

This court, in *Peabody Coal Co.* v. *Pasco,* 452 F.2d 1126, 1132 (6th Cir. 1971), said with reference to the decision of the Kentucky Court in *Martin*:

"The court then considered some of the circumstances attending the execution of the 'broad form' deed involved. It was noted that in 1900 only 17 per cent of the land in Knott County, where the subject property was located, was improved agricultural land. Much of the *Martin* tract was hillside land and of no productive value. The court weighed these facts against the argument that no farmer would intend that his *fields* be destroyed by mining operations. Also considered was the fact that in 1900 the average value per acre of land in Knott County was $2.90 while in 1905 only the mineral rights to the *Martin* tract were purchased for $3.00 per acre. The court apparently considered the evidence that the full value of the land had been paid to the grantor in evaluating the possibility that the original grantor in fact intended to convey the complete use of the surface and to retain bare title for whatever value it may have. Another circumstance mentioned was the fact that even in 1905 there were potential sources of damage to the land from customary deep mining methods. A final consideration examined by the court was that under a 'broad form' deed the surface owner reserved use of the land for agricultural purposes only to the extent that such use was consistent with the rights of the mineral owner. The court considered this factor as evidence that agricultural values were subordinated to mineral values. After considering the particular circumstances surrounding the execution of the *Martin* deed and the particular language of that deed the court held that 'the mineral owner bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals.' 429 S.W.2d at 399."

We hold that the Court of Appeals of Kentucky did nothing more than apply well settled general principles of Kentucky law to interpret a Kentucky deed. This law is neutral and there is not the slightest indication that the Court was motivated by any improper motive or that broad

form deeds were treated in a manner different from other deeds. Nor has the Court of Appeals of Kentucky exercised its power arbitrarily or capriciously or in a manner that would offend fundamental principles of jurisprudence.

The second prerequisite for federal jurisdiction is that the alleged deprivation be committed under color of law. The Watsons contend that Kentucky's environmental laws and regulations are sufficient to constitute the necessary degree of state involvement. In the alternative, they argue that the decisions of the Court of Appeals of Kentucky interpreting the broad form deed in unrelated cases are state action.

Kentucky has regulated extensively the environmental aspects of strip mining. Kentucky Revised Statutes, Ch. 350. The Department of Environmental Protection and its Division of Reclamation are charged with the responsibility of enforcing these laws. K.R.S. 350.020. The purpose of these laws is best shown in the "Declaration of legislative policy and finding of fact," K.R.S. 350.020, which states:

> "The general assembly finds that the unregulated strip mining of coal causes soil erosion, damage from rolling stones and overburden, landslides, stream pollution, the accumulation of stagnant water and the seepage of contaminated water, increases the likelihood of floods, destroys the value of land for agricultural purposes, destroys asthetic values, counteracts efforts for the conservation of soil, water and other natural resources, destroys or impairs the property rights of citizens, creates fire hazards, and in general creates hazards dangerous to life and property, so as to constitute an immiment and inordinate peril to the welfare of the commonwealth. The general assembly further finds that lands that have been subjected to strip mining and have not been reclaimed and rehabilitated in accordance with modern standards constitute the aforementioned perils to the welfare of the commonwealth. The general assembly further finds that there are wide

> variations in the circumstances and conditions surrounding and arising out of the strip mining of coal due primarily to difference in topographical and geological conditions, and by reason thereof it is necessary, in order to provide the most effective, beneficial and equitable solution to the problem, that a broad discretion be vested in the authority designated to administer and enforce the regulatory provisions enacted by the general assembly. Therefore, it is the purpose of this chapter to provide such regulation and control of the strip mining of coal as to minimize or prevent its injurious effects on the people and resources of the commonwealth. To that end, the division and the department are directed to rigidly enforce this chapter and to adopt whatever regulations are found necessary to accomplish the purpose of this chapter."

Pursuant to statutory authorization, K.R.S. §350.060, strip miners are required to obtain permits to mine. In order to obtain a permit, the miners are required to submit, *inter alia*, plans or proposals showing the method of operation, the manner, time and distance for backfilling, grading work and a reclamation plan for the affected area. These plans must meet the minimum requirements of the laws and regulations. Moreover, Chapter 350 provides a full spectrum of mechanisms so as to insure compliance with its provisions.

Apparently conceding that the state action cannot, in this case, be premised on a partnership, governmental function or entwinement theory, the Watson family seeks to rely on an "encouragement" theory and contends that the state's issuance of permits to strip mine is sufficient state action to support federal jurisdiction. Principal reliance is placed on *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). The Watsons contend that when state regulations are aimed directly at the harm complained of, and not peripheral aspects, there is significant state action. Thus, it is argued

that the strip mining regulations are directed at the destructive aspects of strip mining and have the effect of encouraging and approving these practices. We find this argument to be without merit.

Moose Lodge, supra, was a case wherein the policy of a private club was to discriminate against blacks. The plaintiff in that case had alleged that such discrimination was under color of state law because the state of Pennsylvania licensed Moose Lodge to serve liquor. After reviewing the concept of "state action" and admitting that it "frequently admits of no easy answer," the Court went on to analyze the degree of involvement of Pennsylvania with the Moose Lodge. 407 U.S. at 172, 175-77. The Court noted that Moose Lodge was a private club situated on private property and was not publicly funded *Id.* at 171. The state licensing board could require the club to make physical alterations, required the club to file a list of the names and addresses of its members and employees and also required the keeping of extensive financial records. Finally, the board was granted the right to inspect the premises. *Id.* at 176. With this pervasive scheme of regulations, the Supreme Court found no state action because the regulations, regardless of how detailed they might be, did not in any way foster or encourage discrimination, nor was the state a partner or joint venturer in the enterprise. *Id.* at 176-77. Certain regulations, however, were found to constitute state action because they required the club to adhere to discriminatory provisions in its constitution and bylaws. The distinction that emerges from the case is that where regulations give impetus to private conduct so as to foster or encourage it, state action will arise.

Similarly, in *Pollak, supra,* the Public Utilities Commission of the District of Columbia approved the practice of piping radio service into buses that were regulated by the commission. Plaintiffs complained that the piping of radio ser-

vice into the buses violated their constitutional rights. Relying particularly on the fact that the Commission approved of the practice, the Supreme Court found a sufficiently close relationship between the federal government and the radio service to make it necessary to consider the alleged constitutional deprivation. 343 U.S. at 462.

We conclude that these cases do not support the contention of the Watson family. The alleged wrong in this case is that the appellees have been permitted to strip mine the Watsons' land. The right to strip mine and the waiver of damages do not originate with the state licensing authority. They have their origin in the "broad form" deed. Thus, Kentucky's environmentally oriented laws and regulations are not aimed at the alleged wrong. Nor do they encourage strip mining. The effect of these laws and regulations is to narrow and restrict appellees' rights under the deed, and, thus, inure to the benefit of the land owner.

The instant case is also readily distinguishable from our decision in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973). In *Palmer*, the defendant was a utility company to which the state granted powers not usually possessed by private corporations. Additionally, the operations of the company were circumscribed fully by an all encompassing system of regulations and statutes, both state, local and administrative. Virtually every one of the company's activities, including the specific activity complained of, were regulated. In view of these factors, we held that the state had injected itself into a position of interdependence with the company so that it was a joint participant. *Id.* at 165. On the contrary, the state in the present case has not even approached joint participation with the coal companies.

We do not find a sufficiently close relationship between the alleged wrong in this case and Kentucky's environmental laws. Accordingly, we hold that the issuance of a permit to

strip mine to a private coal company for the purpose of enforcing that state's environmental policy is not such state action as would support a claim under 42 U.S.C. §1983.

In the alternative, appellants argue that the line of Kentucky decisions interpreting a broad form deed so as to authorize strip mining is state action.

Since the decision in *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18 (1948), it has been established that a state's judicial proceedings can be a form of actionable state action. *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) (First Amendment deprivation). This principle has been recognized explicitly in recent Supreme Court decisions. *See, e.g., Moose Lodge, supra*, 407 U.S. at 179.

The distinguishing feature of all of these state action cases, however, is the fact that the aggrieved party was a party to the state court proceedings. In this case, the Watsons were never a party to any state court proceedings wherein the interpretation of their broad form deed was at issue. They have proceeded upon the theory that it would have been futile to litigate the deed in the Kentucky courts because "in case after case the Kentucky Court has upheld the right of the mineral estate owner to engage in strip mining." We have found no case that even intimates that state action can be premised on a state's common law as applied to different parties and different issues. Were we to accept appellants' argument, we would be, in effect, predicting the outcome in a case where the intent of the parties governed. It may be possible that the factors considered by the Court in *Martin, supra*, 429 S.W.2d at 397-98, which were critical to that decision are not present in this case. We decline to second guess the Court of Appeals of Kentucky.

We think the case at bar is analogous to the recent line of pre-judgment, self help remedy cases. *See, e.g., Bond* v. *Dentzer*, 494 F.2d 302 (2nd Cir. 1974) (self help attachment of

wages); *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1974) (self help repossession of car); *Bichel Optical Laboratories, Inc.* v. *Marquette Nat. Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973) (self help seizure of funds). In each of these cases the seizure of property involved only private actions arising out of written agreements between the parties. The actions were, however, authorized under state law. The courts refused to find state action based on the mere passage of laws by state legislatures authorizing the agreements. In none of these cases were the parties involved in judicial proceedings. Analogously, in the case at bar the right to strip mine and the waiver of damages are derived from a private agreement, and the Watsons have not been a party to any state proceedings.

We decline to expand the state action concept to embrace a line of state court decisions in transactions unrelated to the one at bar.

We are cognizant of the environmental problems associated with strip mining and are sympathetic with the plight of the Watson family. However, this court is not a super legislature and has no power to act in the absence of jurisdiction. The remedy lies with the legislature and the courts of Kentucky. Two justices of the Court of Appeals of Kentucky have expressed strong views to the effect that the decisions of that court contruing the 1905 broad form deed should be overruled. See dissenting opinion of Mr. Justice Edward P. Hill, concurred in by Mr. Justice James B. Milliken, in *Martin* v. *Kentucky Oak Mining Co.*, *supra*, 429 S.W.2d at 400.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Filed 9/25/73

CIVIL ACTION NO. 1603

MITCHELL WATSON, ET AL. PLAINTIFFS

VS:

KENLICK COAL COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

This action is before the Court on defendants' Motion to Dismiss the Complaint for lack of subject matter jurisdiction, Rule 12(b), F.R.C.P. The question has been argued and briefed by counsel. It is the opinion of the Court that the Motion to Dismiss should be sustained for the reasons which follow.

Plaintiffs are private citizens who claim that destruction of surface rights owned by them in Magoffin County, Kentucky incident to the defendants' past and prospective strip mining of mineral owned by defendants, is actionable in the United States District Court for the Eastern District of Kentucky. Plaintiffs have asserted three gounds for federal jurisdiction. Diversity jurisdiction is asserted under 28 U.S.C. 1331(a) but fails upon the allegations of the Complaint that two of the plaintiffs and all of the defendants are residents and citizens of Kentucky which precludes the diversity required by 28 U.S.C. 1331(a). The plaintiffs seek jurisdiction under 28 U.S.C. 2201 and 2202. These declaratory judgment provisions create a remedy but do not of themselves afford federal jurisdiction. *American Airlines,*

Inc. v. *Louisville and Jefferson County Air Board*, 269 F.2d 811 (6th Cir. 1959). Finally, jurisdiction is sought under 42 U.S.C. 1983 and 1984. Section 1983 is a jurisdictional statute and will be considered.

The purpose of enacting 42 U.S.C. 1983, as stated in *Mitcham* v. *Foster*, 407 U.S. 225, 242 (1972), was to

> "interpose the federal courts between the States and the people, as guardians of the people's *federal* rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial . . .'." (Emphasis supplied.)

Moreover, this Court is sensitive to the teaching of *Hilliard* v. *Williams*, 465 F.2d 1212 (6th Cir. 1972), cert. denied 409 U.S. 1029 (1972), although stated in terms relevant to dismissal for failure to state a claim. Nevertheless, it does not appear that plaintiffs have established the essentials required by 42 U.S.C. 1983 for federal jurisdiction.

This case presents another chapter in the continuing debate in Kentucky over the so-called "broad form" mineral deed. The history of this debate is substantially recited in *Roberts* v. *Twin Fork Coal Company*, 223 F.Supp. 752 (E.D. Ky. 1963). Although the defendants are not alleged to have acted under color of state law in the alleged deprivation of plaintiffs' rights, the Court of Appeals of Kentucky and the Kentucky Division of Reclamation are specifically cited as being involved in plaintiffs' alleged loss. The applicable language of the Complaint states:

> "The Kentucky Court of Appeals' decision, Martin v. Kentucky Oak Mining Company, 429 S.W.2d 395 (1968) . . . constitutes state action violative of the due process of law provision of the Fifth Amendment to the United States Constitution in that the Kentucky Court of Appeals has unconstitutionally involved itself in the taking of PLAINTIFF'S (sic) property without just com-

pensation and without due process of law." (Complaint, paragraph 21.)

and,

> "The issuance of the mining permits to the defendants . . . by the Kentucky Division of Reclamation is state action violative of the due process of law provision of the Fifth Amendment to the United States Constitution . . . in that the Kentucky Division of Reclamation as a state agency, has unconstitutionally involved itself in the taking of PLAINTIFF'S (sic) property without just compensation and without due process of law." (Complaint, paragraph 20.)

Plaintiffs apparently desire to raise two aspects of the Fifth Amendment—deprivation of property without due process and the taking of property for a public use without just compensation—through the conduit of the Fourteenth Amendment making such constitutional standards applicable to actions of the Commonwealth of Kentucky. This procedure is viable and does not require the citation of supporting authority.

Plaintiffs do not plead the taking of property for a public purpose, merely the taking of property. Accordingly, the sole Fifth Amendment question is the deprivation of property without due process of law. To establish federal jurisdiction arising out of conduct between private parties it is imperative that state involvement to a significant degree be established. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Plaintiffs urge the argument that the line of decisions of the Kentucky Court of Appeals culminating with *Martin* v. *Kentucky Oak Mining Company*, Ky., 429 S.W.2d 395 (1968), upholding the so-called "broad form" mineral deed as it is construed to permit strip mining without payment to the surface owner for damages except where resulting from oppressive, arbitrary, wanton, or malicious action, is an unconstitutional act on the

part of the Kentucky Court for the reason that it involves the Court in the impermissible taking of plaintiffs' property without due process of law. Regrettably, neither by argument nor brief have plaintiffs enlightened this Court on the workings of this theory. Effort has been made to find a sufficiently close nexus between the official acts of a state court of last resort as to different issues and parties from those presented in this Court upon which plaintiffs' theory might rest. None has been found.

The Fifth Amendment contemplates by judicial construction both procedural due process and so-called substantive due process. There is no basis advanced to this Court upon which other decisions not involving plaintiffs could give rise to a procedural due process argument. Certainly, the *Martin* decision does not touch this issue, or announce any rule impairing plaintiffs' right to a day in Court. It is somewhat difficult to relate the concept of substantive due process to the acts complained of in this Court. The history of the Fifth Amendment would indicate that consideration of due process other than procedural has been principally applied to test alleged arbitrary and unreasonable governmental classifications or judicial acts as to the complaining party. In result, it would appear that the Supreme Court reaches similar conclusions on like reasoning under the Equal Protection Clause of the Fourteenth Amendment to those reached under Fifth Amendment Substantive Due Process. In any event, in the context of a claim of loss of property by lack of due process occasioned by acts of the Court of Appeals of Kentucky involving other persons, there simply is no basis shown to indicate that the Kentucky Court would treat plaintiffs differently from other litigants. If this Court correctly understands plaintiffs' argument, it is precisely because plaintiffs believe they would be treated like other litigants that this question has been raised. If this understanding is

correct, then the argument is rejected out of hand. This Court has no right or duty to speculate on the outcome of possible litigation in the Kentucky Courts.

Were this Court to assume, which it does not, that the *Martin* decision is erroneous, it is clear that a merely erroneous state court decision does not deprive a party of due process of law. *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927). Neither does the concept of federally protected due process of law have as a predicate any assurance of a correct interpretation of the law nor relief from the consequences of an honest misinterpretation. *Thompson* v. *Kentucky*, 209 U.S. 340 (1908). If a party to litigation is bound by these views, then it is difficult to see how a non-party to the litigation would gain any superior rights. It is within the power of the highest court of a state to determine property rights within its jurisdiction under local laws, customs and usages, and this power is not impaired by the Fourteenth Amendment where no federally secured rights are involved. *Tracy* v. *Ginzberg*, 205 U.S. 170 (1907). A reading of *Martin* v. *Kentucky Oak Mining Company, supra*, shows that no federal question was raised or decided. That decision, therefore, stands as duly determined judicial matter in the Kentucky Court of Appeals. This Court has no warrant to question its propriety in this case or power to alter it. Specifically, this Court holds that the Kentucky Court of Appeals did not violate plaintiffs' Fifth Amendment right to due process of law by deciding the line of cases upholding the Kentucky "broad form" mineral deed. This determination sustains the collateral proposition that such Kentucky decisions cannot support a claim of state action within the meaning of 42 U.S.C. 1983.

On similar reasoning the argument fails that issuance of a strip mining permit to the defendants was an unconstitutional act involving the Kentucky Division of

Reclamation in depriving plaintiffs of their property without due process of law. The legislative determination to regulate strip mining in Kentucky as set forth in Chapter 350, Kentucky Revised Statutes and regulations promulgated thereunder was in aid of the objective "to minimize or prevent its injurious effects on the people and resources of the Commonwealth". KRS 350.020. Plaintiffs' due process argument is limited to the issuance of a permit to strip mine. This Court is not advised as to how the issuance of a strip mining permit under the Kentucky scheme of regulating strip mining offends federally secured rights to due process of law. Neither were plaintiffs parties to the procedure, which negates the procedural due process argument, nor is there any allegation that defendants were treated differently than others to plaintiffs detriment; if, under any view, plaintiffs have standing to raise that question. Again, if this Court correctly understands plaintiffs' argument, it arises out of the fact that a permit to strip mine was issued to defendants under any conditions. Although the issuance of the strip mining permit is clearly state action, it is not actionable state action within the meaning of 42 U.S.C. 1983. There is no relationship pled, argued or authority presented to show that the involvement of the state by issuing a permit to engage in a lawful industry under state regulation deprives plaintiffs of property without due process of law within the meaning of the Fifth Amendment.

On the assertion that plaintiffs' surface rights are "taken" by strip mine operations (omitting the conclusive adverb "unconstitutionally"), no federal constitutional question is raised where it is not shown, at least to an arguable degree, that the taking is impermissible under the federal constitution *and* that "state action" is involved. This Court is unable to find the existence of the jurisdictional elements required under 42 U.S.C. 1983.

The Motion to Dismiss is hereby SUSTAINED.

This case shall be stricken from the docket.
IT IS SO ORDERED this 25 day of September, 1973.

/s/ H. David Hermansdorfer, Judge
H. David Hermansdorfer, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Dorothy B. Wood
D. C.

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 9/28/73
DAVIS T. MC GARVEY, CLERK
BY: /s/ Dorothy B. Wood D.C.

APPENDIX C

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION, 1974

HOUSE BILL NO. 9

THURSDAY, FEBRUARY 21, 1974

The following bill was reported to the Senate from the House and ordered to be printed.

AN ACT relating to strip mining.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 350.060 is amended to read as follows:

(1) No operator shall engage in strip mining without having first obtained from the department through the division a permit designating the area of land affected by the operation. The permit shall authorize the operator to engage in strip mining upon the area of land described in his application for a period of one year from the date of its issuance;

(2) An operator desiring a permit shall file an application which shall state:

(a) The location and area of land to be affected by the operation, with a description of access to the area from the nearest public highways;

(b) The owner or owners of the surface of the area of land to be affected by the permit and the owner or owners of all surface area within five hundred (500) feet of any part of the affected area;

(c) The owner or owners of the coal, to be mined;

(d) The source of the applicant's legal right to mine the coal on the land affected by the permit;

(e) The permanent and temporary post office addresses of the applicant;

(f) Whether the applicant or any person, partnership or corporation associated with the applicant holds or has held any other permits under this chapter, and an identification of such permits;

(g) Whether or not the applicant is in compliance with subsection (3) of KRS 350.130 and whether or not every officer, partner, director or any individual owning of record or beneficially (alone or with associates) if known, ten percent (10%) or more of any class of stock of the applicant, is subject to any of the provisions of subsection (3) of KRS 350.130 and he shall so certify;

(3) The application for a permit shall be accompanied by two copies of a United States geological survey topographic map on which the operator has indicated the location of the operation, the course which would be taken by drainage from the operation to the stream or streams to which such drainage would normally flow, the name of the applicant and date, and the name of the person who located the operation on the map;

(4) The application for a permit shall be accompanied by two copies of an enlarged United States geological survey topographic map meeting the requirements of the subsections below. The map shall:

(a) Be prepared and certified by a professional engineer, registered under the provisions of KRS chapter 322. The certification shall be in the form as provided in subsection (5) below;

(b) Identify the area to correspond with the application;

(c) Show adjacent deep mining and the boundaries of surface properties and names of owners on the affected area and within five hundred (500) feet of any part of the affected area;

(d) Be of a scale of not less than four hundred (400) feet to the inch and not to exceed six hundred and sixty (660) feet to the inch;

(e) Show the names and locations of all streams, creeks, or other bodies of public water, roads, buildings, cemeteries, oil and gas wells, and utility lines on the area of land affected and within five hundred (500) feet of such area;

(f) Show by appropriate markings the boundaries of the area of land affected, the cropline of the seam or deposit of coal to be mined, and the total number of acres involved in the area of land affected;

(g) Show the date on which the map was prepared, the north point and the quadrangle name;

(h) Show the drainage plan on and away from the area of land affected. Such plan shall indicate the directional flow of water, constructed drainways, natural waterways used for drainage, and the streams or tributaries receiving the discharge;

(5) The certification of the maps by the professional engineer shall read as follows: "I, the undersigned, hereby certify that this map is correct, and shows to the best of my knowledge and belief all the information required by the strip mining laws of this state." The certification shall be signed and notarized. The division may reject any map as incomplete if its accuracy is not so attested;

(6) In addition to the information and maps required above, each application for a permit shall be accompanied by detailed plans or proposals showing the method of operation, the manner, time and distance for backfilling, grading work and a reclamation plan for the affected area, which proposals shall meet the requirements of this chapter and rules and regulations adopted pursuant thereto;

(7) Each application shall also be accompanied by a statement of consent to have strip mining conducted upon

the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent. This statement of consent shall not be required for coal mined under the provisions of KRS Chapter 351 and KRS Chapter 352.

(8)[(7)] A basic fee of one hundred and fifty dollars ($150) plus thirty-five dollars ($35.00) for each acre or fraction thereof of the area of land to be affected by the operation shall be paid before the permit required herein shall be issued. The operator shall file with the division a bond payable to the commonwealth of Kentucky with surety satisfactory to the division in the penal sum to be determined by the department on the recommendation of the director of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) for each acre or fraction thereof of the area of land affected, with a minimum bond of two thousand dollars ($2,000), conditioned upon the faithful performance of the requirements set forth in this chapter and of the rules and regulations of the department. In determining the amount of the bond within the above limits, the department shall take into consideration the character and nature of the overburden, the future suitable use of the land involved and the cost of backfilling, grading and reclamation to be required. In a particular instance where the circumstances are such as to warrant an exception, the department, in its dis-

cretion, may reduce the amount of the bond for a particular operation to less than the required minimum.

_____

Speaker-House of Representatives

_____

President of The Senate

Attest:_____

Clerk-House of Representatives

Approved _____

Governor

CONFERENCE COMMITTEE
House Bill 9
March 21, 1974

Members of the Senate and House of Representatives met at 10:30 on Thursday, March 21, 1974, to try to come to an agreement on HB 9.

The meeting was called to order and Senator Gibson was elected chairman of the committee.

After much discussion, there was a unanimous consent of the committee that the following recommendations be made to both houses for concurrence:

(1) Recommend deletion of Senate Amendments No. 1, 2, and 3.

(2) Recommend the following amendment to HB 9:

on page 1, after the enacting clause and before line 1 by inserting the following:

"Section 1. It is the intent of the General Assembly in this Act to declare that the notarized statement of consent

required by Section 2 of this Act is a perfectly legitimate, right, and proper requirement to protect the public safety and welfare as it pertains to the broad form deed. It is also the intent of the General Assembly that this Act does not affect any other form of contract in any manner, nor affect underground mining in any manner."

and on page 6, after line 2, by adding the following:

"Section 3. This Act shall become effective January 1, 1975."

and on page 1, line 1, by renumbering "Section 1" as "Section 2".

[Signed by Senators Gibson, Farris, Stacy and Nard, and Representatives Overstreet, Reynolds and McBee]

IN THE

MICHAEL RODAK, JR. CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-294

MITCHELL WATSON,
MENIFEE WATSON,
IDA MAE MULLINS,
JUDGE WATSON,
OLGA WATSON,
MANILEA ROWE and
RANDOLPH WATSON - - - - - Petitioners

versus

KENLICK COAL COMPANY, INC.,
TIP TOP COAL COMPANY, INC.,
SHERMAN BAILEY,
LEXIE BAILEY,
J. W. HOWARD and
FLORENCE HOWARD - - - - - Respondents

Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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MITCHELL WATSON,
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MANILEA ROWE and
RANDOLPH WATSON - - - - - *Petitioners*

v.

KENLICK COAL COMPANY, INC.,
TIP TOP COAL COMPANY, INC.,
SHERMAN BAILEY,
LEXIE BAILEY,
J. W. HOWARD and
FLORENCE HOWARD - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the exercise of private mineral rights by Respondents in strip mining coal underlying the surface of Petitioners constitute a taking of property

without just compensation in violation of the Fifth and Fourteenth Amendments so as to establish jurisdiction in the Federal District Court under 42 USC 1983?

2. Whether Kentucky's laws and regulations regulating strip mining and/or decisions of the Court of Appeals of Kentucky in unrelated cases, are sufficient state involvement requisite to Federal jurisdiction under 42 USC 1983?

STATEMENT OF THE CASE

Petitioners own an undivided interest (less than all) in the surface of a tract of land located in Magoffin County, Kentucky. In 1905 the coal and mining rights underlying this tract were sold by the remote predecessors in title of Petitioners. The Respondents, the Howards, are private citizens[1] who acquired such coal by mesne conveyances from the original grantee. Respondents, Kenlick Coal Co., Inc. and Tip Top Coal Co. are lessees of the Howards and engaged in strip mining one coal seam on the land. Respondents, Baileys, are officers of the coal companies. The coal companies were exercising, pursuant to their lease, such mining rights as were owned by the Howards.

The essence of the complaint is that Respondents, without the consent of Petitioners,[2] strip mined the

[1]Respondent J. W. Howard is now deceased, having died shortly after the decision in this case by the Court of Appeals and prior to filing this Petition.

[2]This surface was originally owned by Menifee Watson. Menifee Watson is deceased. His widow, Myrt Watson, survives him and has an interest in the surface but is not a party to this action. Petitioners are some (but not all) of the surviving children of Menifee Watson.

coal and that such mining destroyed the surface which constituted a denial of due process and a taking of the land without just compensation. Petitioners allegation of state action is premised upon the issuance of permits to strip mine by Kentucky and/or upon decisions of the Court of Appeals of Kentucky in unrelated cases.

Respondents were exercising rights granted to them under the express terms of the 1905 severance deed. This deed severed the mineral rights from the surface estate thereby creating two distinct and separate estates in the land. The deed conveyed all the coal in, on and under the land, contained no limitations or prohibitions on the method to be used to extract the coal, and contained an express waiver of damages.[2] Clearly, the surface estate was subservient to the mineral estate. The surface mining by Respondents was "contour" surface mining and not "flat" surface mining. In contour mining the coal is stripped from along the outcrop of coal seams high on the hills and not from flat surface, and such mining disturbs only that portion of the surface along the outcrop of the coal seam and disturbs only that portion of the surface hill land necessary to remove the coal.

In conducting their strip mining operations, Respondents were exercising property rights which they owned by virtue of the severance deed and for which Petitioners' predecessors in title had been paid.

---

[2]The pertinent granting clause of the 1905 severance deed is copied in the opinion of the Court of Appeals (App. A, Petition—pp. 3(a)-5(a)).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Court of Appeals was clearly correct in holding that the strip mining on Petitioners' surface did not deprive Petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and that there was no such deprivation under color of state law. Under the severance deed the predecessors in title to Petitioners sold and gave up their right to prevent Respondents from strip mining and thus they have no such property rights which they now complain have been taken from them.

The regulation of strip mining by Kentucky does not constitute State action sufficient to support a claim under 42 USC 1983. The Respondents' right to strip mine did not originate with the State of Kentucky but originated from the rights acquired by the mineral owner under the severance deed.

Furthermore, the State regulations do not encourage strip mining but in fact restrict it. The State is not in any sense a "partner" or "joint venturer" in the strip mining, and the State laws and regulations in no sense encourage such. Likewise, the decisions of the Court of Appeals of Kentucky interpreting the "broad form" mineral deeds in unrelated cases (in which Petitioners were not parties) is not sufficient State action to support a claim under Section 1983. The right to strip mine was a property right acquired by the original grantee under the severance deed of 1905 and which right is now owned by Respondents.

To confer jurisdiction in the Federal Court under 42 USC 1983, there must be both a deprivation of a right secured to the Petitioners under the United States Constitution and State action. Neither element is present in this case.

I.

The Court of Appeals Was Clearly Correct in Holding That Strip Mining By Respondents Was Not a Taking of Petitioners' Surface in Violation of Their Fifth and Fourteenth Amendment Rights.

The disturbance of Petitioners' surface by the mining operations of Respondents was not a taking of property without due process. Respondents in their mining operations were exercising rights owned by them and acquired under the original severance deed. Petitioners' predecessors in title sold these rights and were paid for them. Petitioners cannot now claim that the exercise of these rights is an unlawful taking of their surface since they did not, and do not, own the rights which they complain have been "taken".

The Court of Appeals of Kentucky has consistently held that the "broad form" deed gives the mineral owner the right to strip mine. Only if this right is exercised in a wanton, oppressive, malicious or arbitrary manner, is the mineral owner subject to liability to the surface owner. See *Martin* v. *Kentucky Oak Mining Co.*, 429 S. W. 2d 395, 399 (1968); *Buchanan* v. *Watson*, 290 S. W. 2d 40, 43 (1956). And if mining is conducted in such a wanton, oppressive, malicious or arbitrary manner, the proper forum in an action for

redress is the State court and not the Federal Court—absent diversity which is not present here.

As was said in *Martin* v. *Kentucky Oak Mining Co., supra,* ". . . the mineral owner bought and paid for the right to destroy the surface on good faith exercise of the right to remove the minerals . . ." and consequently "there is no basis upon which there could rest an obligation to pay damages for this right."

Petitioners apparently contend that this interpretation of this type deed has denied them due process and constitutes a taking without compensation. The rationale of this argument is hard to follow. It seems well-settled that the rights and liabilities under a deed is a question of State law unless there is a violation of the Constitution or laws of the United States. See *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269 (1927); *Tracy* v. *Ginzberg,* 205 U. S. 170 (1907); *Evans* v. *Abney,* 396 U. S. 435, 439, 443-44 (1970).

Decisions of State courts involving the ownership of property, cannot be said to deprive the unsuccessful party of property without due process simply because his claim was denied. The Federal court cannot act as a super legislature by setting aside the property law of the state even though the Court might consider the law unwise and harsh. The Kentucky Court in its decisions interpreting the "broad form" deeds did no more than apply well-settled general principles of Kentucky law and there is nothing indicated to show that the Court was motivated by an improper motive or that the broad form deeds were treated any differently from other deeds. Certainly there is nothing to suggest that

the Kentucky Court exercised its power arbitrarily or capriciously. On this point, Mr. Justice Harlan, in *Tracy* v. *Ginzberg, supra,* stated the following:

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property . . . Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty."

The Court of Appeals for the Sixth Circuit, in *Peabody Coal Co.* v. *Pasco,* 452 F. 2d 1126, 1132 (6th Cir. 1971) in discussing the decision of the Kentucky Court of Appeals in *Martin* v. *Kentucky Oak Mining Co., supra,* said:

> "The court then considered some of the circumstances attending the execution of the 'broad form' deed involved. It was noted that in 1900 only 17 per cent of the land in Knott County, where the subject property was located, was improved agricultural land. Much of the *Martin* tract was

hillside land and of no productive value. The court weighed these facts against the argument that no farmer would intend that his *fields* be destroyed by mining operations. Also considered was the fact that in 1900 the average value per acre of land in Knott County was $2.90 while in 1905 only the mineral rights to the *Martin* tract were purchased for $3.00 per acre. The court apparently considered the evidence that the full value of the land had been paid to the grantor in evaluating the possibility that the original grantor in fact intended to convey the complete use of the surface and to retain bare title for whatever value it may have. Another circumstance mentioned was the fact that even in 1905 there were potential sources of damage to the land from customary deep mining methods. A final consideration examined by the court was that under a 'broad form' deed the surface owner reserved use of the land for agricultural purposes only to the extent that such use was consistent with the rights of the mineral owner. The court considered this factor as evidence that agricultural values were subordinated to mineral values. After considering the particular circumstances surrounding the execution of the *Martin* deed and the particular language of that deed the court held that 'the mineral owner bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals.' 429 S. W. 2d at 399."

From the foregoing it is clear that there was no taking or invasion of Petitioners' rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

II.

Adverse Prior Decisions of State Court Are Not Sufficient State Action to Attach Federal Jurisdiction.

It is recognized that a State court decision may be sufficient State action to create a cause of action under Sec. 1983. *Shelley* v. *Kraemer,* 334 U. S. 1, 14-18 (1948). Even then Federal jurisdiction is conferred by 28 U.S.C. 1343 (3) which is not pled or cited by Petitioners. This principle was recognized in the recent case of *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163 (1922). However, as pointed out in the opinion of the lower court (App. 18a-Petition) the distinguishing feature in those State action cases is the fact that the complaining party was a party to the State court proceedings. This is not the case here. Respondents have never been a party to any State court proceeding where the interpretation of a broad form deed similar to the one in this case was at issue. State action cannot be premised on the common law of a state as applied to different parties and different issues. To do so would be putting this court in the position of guessing or predicting the outcome of such a case.

Judge Swinford, in *Roberts* v. *Twin Fork Coal Company,* 223 F. Supp. 752, in discussing the import of *Shelley* v. *Kraemer,* supra, said:

> "The mere fact that the defendant finds comfort in the Kentucky decisions condoning strip mining in particular cases having no connection with the present controversy does not make the State an active participant in this case. Shelley v. Krae-

mer does not even intimate that state involvement in a particular transaction may be found in the fact that a state court decision in a similar but unrelated transaction has, by force of precedent, the power to determine the legal consequences. The petitioners in the federal phase of Shelley v. Kraemer were complaining of action by a state court in a case to which they were parties and which was specifically aimed at them. Here the plaintiff has never been directly subjected to action by the Kentucky Courts and his position is accordingly so dissimilar to that of the petitioners in Shelley that analogy between the two cases is imperceptible.

To hold otherwise would be to view the State an active participant in any private conduct that has consequences under the State common law and thus to subject it to evaluation by the federal courts according to its compliance with the Fourteenth Amendment."

A mere erroneous decision of a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company* v. *Kentucky, supra; Thompson* v. *Commonwealth of Kentucky,* 209 U. S. 340 (1927); *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 193 (1903); *Tracy* v. *Ginzberg, supra.*

The Court of Appeals was correct in holding that the decisions of the Court of Appeals of Kentucky are not sufficient to constitute the necessary degree of state involvement.

III.

State Regulations Not Sufficient State Action to Confer Jurisdiction

Kentucky has extensively regulated strip mining. Kentucky Revised Statute, Ch. 350. The issuance of strip mining regulations under KRS, Ch. 350, do not in any manner foster or encourage strip mining. If anything the regulations restrict and often proscribe such mining. The ownership of the minerals and appurtenant rights to mine are derived not from state law and regulations, but from the mineral severance deed.

To hold that such state regulations constitute state action would be stretching the "state action" concept very thin, in which event it would be expected the Federal courts would be inundated with cases arising out of such, or similar, state action.

As noted in the opinion of the Court of Appeals (App. 15a and b, Petition), Petitioners apparently consider that state action cannot be premised on a partnership, governmental function or entwinement theory, but seek to rely upon the "encouragement" theory and contend that the issuance of permits to strip mine is sufficient state action. They rely principally on *Moose Lodge No. 107* v. *Irvis,* supra, and *Public Utilities Commission* v. *Pollak,* 343 U. S. 451 (1952).

The principles enunciated in the above cases offer no comfort to Petitioners. The right to strip mine did not originate with the State of Kentucky but had its

origin in the mineral severance deed. Kentucky's laws are not aimed at the alleged wrong, nor do they encourage strip mining. The effect of these laws is to narrow and restrict Respondents' rights under the deed, which inures to the benefit of the surface owners.

The Court of Appeals was correct in holding that Kentucky's environmental laws and regulations are not sufficient to constitute the necessary degree of state involvement.

CONCLUSION

The jurisdictional elements required to create a cause of action under 42 USC §1983 do not exist in this case. There is no "taking" of the land of Petitioners within the meaning of either the Fifth or Fourteenth Amendments. The Petitioners have not availed themselves of the natural forum—the Courts of Kentucky—on the ground that prior decisions of that forum would render their efforts futile. Neither the decisions of the Kentucky Court of Appeals interpreting property rights under mineral severance deeds adverse to the contention of Petitioners nor the regulations of mining by the State of Kentucky can support a claim of "state action" within the meaning of Section 1983.

For the foregoing reasons, Respondents say that the Petition for a Writ of Certiorari should be denied, it is

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